

ROBERT L. BAYLESS

IBLA 94-398, 94-714, 96-51

Decided February 21, 1997

Appeals from decisions of the New Mexico State Office, Bureau of Land Management, concerning gathering and reporting of natural gas production on Tribal leases. Jicarilla 457 through 460, 462, and 464; (NM) SDR 94-12, SDR 94-029, and SDR 95-027.

Affirmed as modified in part; reversed in part.

1. Oil and Gas Leases: Generally--Rules of Practice: Appeals:
Burden of Proof

A BLM order requiring the disconnection or shutting in of non-Tribal wells connected to a gas gathering system including Tribal wells will be reversed when BLM fails to provide any justification for such an order.

2. Oil and Gas Leases: Production

Under 43 CFR 3162.7-3, gas production generally must be measured by orifice meters or other methods acceptable to the authorized officer, but off-lease measurement and/or commingling may also be approved. The authorized officer may rescind an earlier approval allowing off-lease measurement and surface commingling of gas if BLM determines that off-lease measurement has resulted in under-reporting of volumes of gas produced, but such a rescission will not be applied retroactively to require amendment of previously submitted production reports when the operator measured and allocated production in accordance with the approved plan in effect at that time.

APPEARANCES: Tommy Roberts, Esq., Farmington, New Mexico, for appellant; Margaret Miller Brown, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management; Jill E. Grant, Esq., Washington, D.C., for the Jicarilla Apache Tribe, intervenor. 1/

1/ By order dated Sept. 6, 1996, the Board granted the Jicarilla Apache Tribe's motion to intervene and request to file an answer.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Robert L. Bayless has appealed from three decisions of the New Mexico State Office (NMSO), Bureau of Land Management (BLM), concerning the gathering and reporting of natural gas production on Tribal leases Jicarilla 457 through 460, 462, and 464. By order dated January 22, 1996, the Board consolidated the three appeals because they arise from a common factual background and present closely related questions of fact and law.

Bayless is the owner and operator of the Cabresto Gas Gathering System located in T. 30 N., Rs. 3 and 4 W., New Mexico Principal Meridian (NMPM), Rio Arriba County, New Mexico (Statement of Reasons (SOR) in IBLA 94-714 at 3). The Cabresto system currently connects 29 wells operated by Bayless. Four of those wells are plugged and abandoned; all but three of the remaining wells are located on the Jicarilla Apache Tribe Reservation. Id. Under the system under review in these appeals, Bayless measured the aggregate production from wells attached to the system for sales purposes at a meter located off the reservation in the SE $\frac{1}{4}$ sec. 25, T. 30 N., R. 4 W., NMPM, Rio Arriba County, New Mexico. He then allocated the volume of natural gas measured at the sales meter back to the individual wells based on readings from orifice meters installed at each wellhead. Id. 2/

The Cabresto Gas Gathering System evolved from the drilling program Bayless began on Tribal, fee, and communitized Federal leases in 1987. The drilled and completed wells, most of which were low volume natural gas producers, were shut in awaiting pipeline connections. In order to achieve sufficient volume to allow the natural gas to be marketed, Bayless was required to run gathering lines from each wellhead, where he installed small orifice meters, to a single central sales meter installed by Northwest Pipeline Corporation at the off-reservation central delivery point. Additional wells, with installed orifice meters, were connected to the central sales meter as they were drilled and completed. From the inception of the Cabresto gathering system, Bayless has uniformly and consistently reported sales volumes based on measurements at the sales meter apportioned back to the individual wells (SOR (IBLA 94-714) at 5-6; Response to Answer of Jicarilla Apache Tribe (Response) at 2).

2/ Apparently, the wellhead orifice meter readings are summed and a percentage calculated for each well, using the wellhead orifice meter reading as the numerator and the sum of the readings as the denominator. That percentage is then presumably applied to the reading of the single sales meter on the gathering line to determine the production allocated to the individual well. See Bayless Letter to the Farmington Resource Area Office (FRAO), Aug. 12, 1992.

By letter dated August 12, 1992, Bayless sought approval from the FRAO for the surface commingling and off-lease measurement of gas produced from 23 wells: 3/

Please let this letter serve as our request for off-lease measurement and surface commingling for the 23 wells shown on the attached map. The actual sales meter, highlighted in yellow, is in Section 25-T30N-R4W. Each well upstream from this sales meter has a small meter run, which will be used to allocate production back to individual wells.

Many of these wells are low volume producing wells, and measurement is difficult. Therefore, the allocation meters will be used as a "percentage of total" factor for the actual volume sold.

Also, the only storage for condensate is located approximately at the 464 #1 location. Again, this condensate production will be allocated back to individual wells based on gas allocation figures.

(Bayless Letter to FRAO, Aug. 12, 1992). The letter was stamped by BLM, "Approved, August 13, 1992, Area Manager."

On December 16, 1993, the Rio Puerco (New Mexico) Resource Area Office (RPRAO), BLM, issued an order directing Bayless to immediately disconnect the three non-Tribal wells from the Cabresto Gas Gathering System: 4/

We have been working with the Jicarilla Apache Tribe and the Minerals Management Service (MMS) [5/] to resolve discrepancies

3/ Apparently the number of wells connected to the Cabresto system had increased to 29 by the time the SOR submitted in IBLA 94-714 was written.

4/ A copy of the Dec. 16, 1993, order is attached to SOR (IBLA 94-398) as Exhibit A. It is not clear from the record why the order was issued by RPRAO instead of FRAO, except that NMSO's Mar. 3, 1994, decision indicates that the former "is accountable for Jicarilla Apache Tribal Lands."

5/ The record shows that BLM became aware of discrepancies in volume reporting as a result of an audit conducted by the Dallas Area Audit Office (DAAO), MMS. By memorandum dated July 15, 1993, DAAO advised BLM's FRAO that its "audit disclosed that Bayless was using an off-lease measurement point to pay royalties instead of the wellhead meters," resulting in under-reporting of sales volumes by 50,761 thousand cubic feet (mcf) for 2 test months on eight Jicarilla leases. When DAAO ordered Bayless to recalculate the royalties for all Jicarilla leases using the wellhead measurement, Bayless appealed, stating that on Aug. 13, 1992, BLM had approved the off-lease measurement point. MMS' memorandum further stated that, according to MMS payor instructions, Bayless was "required to calculate and pay royalties at the BLM approved measurement point." However, BLM's approval of the off-lease measurement point "will result in the Jicarilla Tribe's being paid on approximately 25,000 Mcf per month less than if measured at the wellhead."

in gas volumes being reported on several leases connected to the Cabresto Gathering System. * * *

Although you were granted approval for off-lease measurement on August 13, 1992, there is some doubt as to the allocation of production to the [Jicarilla] leases. Our approval granted allocation based on meters at each wellhead. MMS has reports indicating allocation is based on three central meters. If these three meters are being used for allocation, you are in violation of the approval.

It has come to our attention that three fee wells off the reservation are also hooked up to the Cabresto Gathering System.

These wells must be disconnected immediately. Only wells on Tribal lands will be allowed to be hooked to the system.
[Emphasis in original.]

Although the order does not so specify, the "three fee wells off the reservation" are the Simms Nos. 1, 6, and 7 wells, located on communitized fee and Federal acreage in secs. 13, 24, and 12, respectively, T. 30 N., R. 4 W., NMPM, Rio Arriba County, New Mexico (SOR (IBLA 94-398) at 1 and n.2).

RPRAO's order further required Bayless to provide information concerning the extent and nature of the Cabresto Gathering System, so that it could review the August 13, 1992, approval for off-lease measurement. BLM demanded an accounting of gas used at each well and at compressors or dehydrators from June through September 1993, noting that it "appears that the gas is being deducted at each well and then again at the sales meter." 6/ RPRAO's order warned that, "[i]f this information does not help us determine a legitimate reason for volume differences, we will rescind our Aug. 13, 1992 approval. If the approval is rescinded, each well meter will be considered the point of sale."

fn. 5 (continued)

The memorandum concluded: "In order for our office to complete its audit on Robert L. Bayless, we are requesting a final decision on the proper gas measurement point that Bayless should be using. In our opinion, BLM should require that the royalty measurement be at the well."

6/ The requested information also included the location of all gas meters and piping for a newly installed gas compressor; the location of the "three meters," apparently associated with Northwest Pipeline Corporation (see n.7, below); the location of drip tanks or pots; an economic analysis as to why it is in the Tribe's best interest to allow off-lease measurement on the leases; the allocation factors for June through September 1993 for each of the wells connected to the system and the basis for those factors, including the method for estimating gas vented or flared; and a copy of British thermal unit (Btu) testing for the wells connected to the system for the years of 1991 and 1992. The record contains information filed by Bayless on Jan. 18, 1994.

Bayless sought State Director review under 43 CFR 3165.3 of only that portion of the RPRAO order demanding immediate disconnection of the three off-reservation wells, citing the lack of statutory or regulatory authority for the order and the prior BLM approval of surface commingling and off-lease measurement in support of his request. ^{7/}

On March 3, 1994, NMSO issued a decision upholding the December 16, 1993, order to disconnect: ^{8/}

Bayless is correct in the belief that there is no statutory or regulatory provisions prohibiting the surface commingling of production from non-tribal lands with tribal lands. However, the approval lacks the safeguards normally associated with commingling production from tribal and non-tribal wells.

The [RPRAO] * * * is [reevaluating] the approval [for off-lease measurement and commingling of production.] Their initial review concludes that the system, as approved, does not meet BLM requirements for production commingling involving mixed royalty interests. In addition to the three Simms wells, there are three Tribal wells in this system which have elevated royalty obligations. It is not to the tribe's best interest to allow the commingling of all the wells in this system as approved.

[RPRAO's] order to disconnect the three non-tribal wells is upheld. Bayless is ordered to immediately disconnect from the Cabresto Gathering system or shut-in the three Simms Wells No. 1, 6 and 7.

[RPRAO] has advised us that the off-lease measurement and commingling approval is to be revoked. The commingling and off-lease measurement approval is remanded to [RPRAO] for the appropriate action.

Bayless appealed NMSO's decision, and that appeal was docketed as IBLA 94-398. By order dated June 20, 1994, the Board suspended the effect of BLM's order to disconnect or shut-in the non-Tribal wells pending consideration of the appeal.

In a letter dated April 12, 1994, RPRAO rescinded its August 13, 1992, approval of surface commingling and off-lease measurement because Bayless' original application did not meet the requirements for surface commingling of production with different royalty rates. The

^{7/} In his review request, Bayless also explained that he utilized three central meters because he owned and operated three gas gathering systems, each of which had a separate sales meter, and that only one central sales meter measured gas from wells connected to the Cabresto Gathering System.

^{8/} The decision is signed by the Deputy State Director, Lands and Minerals, NMSO.

deficiencies included the application's failure to contain most of the following required items: 9/

(1) A formal request for approval to combine production with an appropriate explanation and diagrams describing the proposed operation in detail.

(2) A map showing the lease numbers and location of all leases and wells that will contribute production to the proposed commingling. All producing zones or pools must be clearly illustrated or detailed by suitable means.

(3) A schematic diagram which clearly identifies all equipment that will be utilized.

(4) Estimated amounts and types of production involved.

(5) Details of the proposed method for allocating production to contributing sources.

(6) A statement that all interest owners have been notified of the proposal.

(7) Evidence that Federal or Indian royalties will not be reduced through approval of the application.

(8) Detailed economic justification, when the application to combine production is based upon economic necessity, i.e. the applicant contends that such approval is necessary for continued operation of the Federal or Indian leases.

(Apr. 12, 1994, Letter at 1-2).

RPRAO acknowledged that approximate measurement or calculated apportionment was appropriate if the leases were all Federal or all Indian leases with identical royalty rates. BLM noted, however, that different royalty rates applied to some of the production from the involved leases, and that

[c]ombining of production at the surface between Federal or Indian leases with different royalty rates can be approved only if production from the different sources is accurately measured and sampled for royalty purposes prior to being combined. If royalty rates for production from different zones or pools differ, then each source of production must be accurately and individually measured unless the applicant can show that no royalty loss will occur through the combining of production.

9/ These "required items" are taken from Part 644, Chapter 3 of the U.S. Geological Survey Conservation Division Manual (CDM).

There is also the problem of the significant difference between allocation meter and the sales meter volumes. Some of this difference may be due to temperature compensation at the meters and the difference between calibration standards for sales meters versus allocation meters. This would only account for a small portion of the difference. It appears that the majority of the difference is due to venting of the gas in the lines due to line blockages from freezing during the winter months. With an approved and properly operated central point delivery system, the venting of gas during the winter months is an accepted and allowable practice to unblock the lines so that production from the wells can continue. However, the volumes of gas vented were not properly tracked or accounted for.

(Apr. 12, 1994, Letter at 2). The letter required production to be measured "by the meter at the individual wellhead and royalty [to] be paid on that volume" and directed the meters to "be calibrated to sales meter standards as required by Onshore Order No. 5" within 60 days of Bayless' receipt of the order. Id. RPRAO informed Bayless that he could file alternative measurement requests for any wells that qualified due to low volume gas production. RPRAO also instructed Bayless to submit amended production reports for the period August 1992 through April 1994.

Bayless sought review by the State Director, NMSO, of the RPRAO rescission decision, asserting that BLM's prior approval of the surface commingling and off-lease measurement plan established the validity of the plan, and that the volume differences could be explained by gas measurement meter calibration differences and gas venting.

By decision dated June 24, 1994, NMSO's Acting Deputy State Director upheld both the rescission of BLM's previous approval and the requirement for calibration of individual wellhead meters to minimum standards. However, he remanded that part of RPRAO's letter requiring Bayless to submit amended production reports to RPRAO "for volume determination based on gas metered at the wellhead." In upholding the rescission, the Acting Deputy State Director admitted that in approving appellant's commingling and off-lease measurement system, BLM had failed to adhere to all procedures set forth in the CDM, Part 644, Chapter 3 (1974).

The Acting Deputy State Director pointed out that BLM had the authority to approve surface commingling of production from Federal leases with different royalty rates and from Federal, Indian Tribal, and non-Federal leases only if Federal or Tribal production was first accurately measured and sampled for royalty purposes. This requirement could be relieved, he added, if it could be justified as economically necessary in the interest of conservation, and if no reduction of Federal or Indian royalty revenues or improper allocation of Federal or Indian production would result. The Acting Deputy State Director also found that, although RPRAO had notified Bayless on December 16, 1993, that it was reconsidering its earlier approval and that it had doubts about the allocation of production to the

involved leases, Bayless had failed to provide the calculations used to account for volumes of gas actually vented or document an adequate system for tracking vented gas.

Bayless' appeal of the June 24, 1994, decision was docketed as IBLA 94-714. No request for stay was filed.

On August 17, 1995, RPRAO issued a third decision disclosing its volume determinations for the period August 1992 through April 1994. Attached to that decision was an audit report summarizing gas volume reporting for nine Tribal wells and the Simms Nos. 6 and 7 wells for the period. The report calculated 1,171,177 mcf as the total of the on-lease meter readings for the 20 wells reporting production and 151,032 mcf as the total volume not reported by Bayless on Monthly Report of Operations Forms MMS-3160. BLM determined that the volumes identified in the report should have been reported to MMS and ordered correction of the information in the well records as appropriate.

Bayless sought State Director review of this volume-discrepancy determination, reiterating that production had been properly reported based on the approved off-lease measurement and surface commingling plan and specifically objecting to BLM's failure to recognize that only a portion of the production for two of the wells was attributable to the Federal lands included within the spacing or proration unit established for the well.

On September 29, 1995, the Deputy State Director, NMSO, issued a decision affirming the volume determinations by RPRAO and the amended reporting requirement. In so doing, he rejected Bayless' proration argument on the ground that applicable regulations and the MMS PAAS Onshore Oil and Gas Reporter Handbook required reporting 100 percent of production even if the communitized area was not 100 percent Federal.

Bayless' appeal of that decision was docketed as IBLA 96-51.

On appeal, Bayless challenges the propriety of RPRAO's December 16, 1993, order to disconnect or shut in the Simms Nos. 1, 6, and 7 wells. He also argues that RPRAO improperly rescinded BLM's August 13, 1992, approval of surface commingling and off-lease measurement, and that for this reason RPRAO's volume determinations are immaterial. He does not contest those volume determinations. 10/

10/ In the SOR submitted in IBLA 96-51, Bayless states that he "does not, by this appeal, challenge the volume calculations contained in the decision dated August 17, 1995 and affirmed by the [NMSO] decision. Bayless does, however, challenge the materiality of those calculations." Bayless asserts that "[t]he issue to be resolved pursuant to this appeal [IBLA 96-51] is whether the BLM approved plan of off-lease measurement and surface commingling was properly rescinded by the [RPRAO]. This is exactly the issue pending before the [Board] in Docket No. 94-714."

[1] By order dated June 20, 1994, the Board stayed the effect of NMSO's March 3, 1994, decision upholding the order to disconnect the three non-Tribal wells (IBLA 94-398). We found that NMSO's decision neither specified what "safeguards" are normally "associated with commingling production from Tribal and non-Tribal wells," nor explained why it was necessary to disconnect the three non-Tribal wells drilled on communitized fee and Federal acreage. We concluded that, even if it could be established that using a single point of measurement resulted in improper under-reporting of production, there was nothing in the record to show that such under-reporting affected the Tribal leases more than the non-Tribal leases. Finally, we found that in the absence of evidence showing that commingling the production resulted in some unique prejudice to the Tribal leases, there was no justification for BLM's order to disconnect the non-Tribal wells or shut them in. For these reasons, and based on the standards of 43 CFR 3165.4(c)(1), (2), and (3), we granted Bayless' request for stay.

As of the date of issuance of our order, BLM had not yet had an opportunity to file an answer to the SOR. In his SOR (IBLA 94-398) on page 6, appellant states: "As a practical matter, it is much easier to maintain proper calibration of the sales meter than it is to maintain proper calibration of the numerous individual wellhead meters." On July 5, 1994, as its response to the SOR, BLM filed a June 23, 1994, memorandum from the NMSO Acting Deputy State Director. The memorandum does not address the propriety of requiring appellant to disconnect or shut in the three non-Tribal wells. Rather, it makes the sole point that under "Onshore Oil and Gas Order No. 5, [a]ll sales meters and wellhead meters are required to meet the minimum standards for calibration as prescribed in Onshore Order No. 5," and that minimum standards for measurement of natural gas using orifice meters are listed in Section III.C. of that order.

Because no justification has been shown for requiring appellant to disconnect or shut in the Simms Nos. 1, 6, and 7 wells, NMSO's March 3, 1994, decision must be reversed. See Foster Minerals, Ltd., 128 IBLA 192, 199 (1994) (reversing BLM usage of State survey lines to delineate the boundaries of a known geologic structure for failure to provide justification for that approach).

[2] Bayless challenges BLM's rescission of its August 13, 1992, approval of off-lease measurement and commingling. He notes that the measurement system had been in effect since the completion of his 1987 drilling program, and that during this time, he consistently reported the volumes measured at the sales meter and allocated those volumes back to individual wells. He asserts that this system of measurement is accurate since most, if not all, of the wells behind the sales meter are low-volume wells difficult to accurately measure. Bayless contends that, as a practical matter, it is much easier to maintain proper calibration of the sales meter than the numerous individual wellhead meters, and that the use of wellhead meters actually results in an overstatement of volumes of gas produced. He maintains that the system of measurement now in place assures greater accuracy of measurement for all parties, working interest owners and nonworking interest owners alike (SOR (IBLA 94-714) at 7).

Bayless also argues that BLM's August 13, 1992, approval of his measurement system was economically justified. He states that he went to the expense of laying gathering lines to connect his wells to the existing pipeline transportation system, and that, without such lines, there would have been no sales of produced gas. He further indicates that measurement at a central sales meter was "dictated" and "imposed [by] the pipeline company," and that he could not afford to economically operate his gathering system given the expenses of "individual well metering, meter calibration, compression and dehydration" (SOR (IBLA 94-714) at 8-9).

Bayless cites Part 644.3.3E of the CDM (1974), which states that approvals for combining production and off-lease measurement "simply provide that the method approved is a proper way to measure, store, and/or dispose of the Federal or Indian royalty portion of production," and argues that this provision "creates a presumption that an approved plan for off-lease measurement and surface commingling provides for a proper way to measure, store and/or dispose of the Federal or Indian royalty portion of production" (SOR (IBLA 94-714) at 9). He contends that BLM, as the party attacking the approved plan, has the burden of rebutting this presumption, but has failed to successfully satisfy that burden (SOR (IBLA 94-714) at 9-10).

Specifically, Bayless asserts that BLM's approval of the plan implies that BLM had all necessary and relevant information and data and knew that the surface commingling and off-lease measurement plan involved production attributable to leases with different royalty rates and to non-Tribal as well as Tribal lands (SOR (IBLA 94-714) at 10). Bayless concedes that his plan contained less detail than the CDM guidelines, but argues that BLM historically has not followed or enforced those guidelines and thus has waived compliance with those requirements. He also maintains that he has operated his system in good faith and in reliance on BLM's approval of his plan, and that to revoke the approval as contrary to applicable guidelines constitutes an abuse of discretion (SOR (IBLA 94-714) at 11-12). Bayless further denies that BLM has cited or produced any substantive evidence showing that his measurement system does not ensure accuracy of measurement or allocation of production or fails to adequately protect Federal or Indian royalty interests (SOR (IBLA 94-714) at 12). Bayless submits that the plan approved on August 13, 1992, should continue to be recognized as valid and acceptable, or, alternatively, that the rescission decision should be effective only from the date of his receipt of the decision and not retroactively (SOR (IBLA 94-714) at 13).

In its answer, the Jicarilla Apache Tribe (the Tribe) argues that the Government has a fiduciary duty to the Tribe to ensure accurate measurement and accounting of gas production and full payment of royalties, and that this duty mandates the affirmance of the rescission and related orders (Answer at 6). The Tribe cites the following alleged deficiencies with Bayless' off-lease measurement and surface commingling plan which render the plan inadequate to satisfy the Department's trust obligation: Bayless failed to seek approval of the plan until 4 years after he began producing under the plan, in contravention of 43 CFR 3162.7-3 and Onshore Oil and Gas

Order No. 5; the plan contains incomplete and insufficient information; and Bayless' actions under the plan have resulted in the loss of royalties owed to the Tribe due to the under-reporting of gas volumes produced from the leases and the failure to account accurately for deductions taken from those volumes (Answer at 7-8). The Department's fiduciary duty can only be satisfied, the Tribe asserts, by requiring Bayless to measure gas volume at the wellhead with accurate meters and properly account for all production and deductions (Answer at 11). 11/

The Tribe argues that BLM's earlier approval of the plan does not estop BLM from rescinding that approval, and that BLM's alleged failure to enforce plan application requirements against other operators does not reduce BLM's authority to rescind the approval (Answer at 13-14). The Tribe also contends that nothing prevents the rescission decision from being applied retroactively, since Bayless should have known that BLM could not have made an informed decision on the propriety of the plan absent supporting documentation, and that he, in fact, did know as early as December 16, 1993, that plan approval was likely to be rescinded (Answer at 14-15).

In response, Bayless argues that the operation of the Cabresto Gas Gathering System in accordance with the approved plan has not adversely affected the royalty income of the Tribe. In fact, Bayless asserts, the Tribe has realized an economic benefit from its royalty interests only because of the implementation of the plan, without which no sales would have been effected (Response at 3). Bayless denies that any under-reporting has occurred, pointing out that BLM and the Tribe have failed to substantiate any such allegation (Response at 4). Nor, Bayless submits, has BLM or the Tribe demonstrated any incident of mistake or manipulation resulting from the operation of the Cabresto System in accordance with the approved plan (Response at 5).

Bayless repeats that the failure to calibrate the wellhead allocation meters to sales meter standards does not explain the difference between aggregate volumes measured at the orifice meters and the volumes measured at the central delivery point sales meter, noting that when he calibrated the individual orifice meters as ordered by BLM, only minor adjustments were needed (Response at 5). Bayless avers that much of the volume differential stems from the inherent nature of the measurement system. According to Bayless, the use of accurately calibrated wellhead allocation meters to measure low wellhead volumes results in the overstatement of the volumes of gas produced, while measurement of greater volumes at the central delivery point sales meter more accurately reflects actual volumes produced (Response at 5-6 and n.3). Bayless asserts that the Tribe is paid royalty

11/ Although the Tribe asks that it be compensated for the amount of royalties lost over a nearly 10-year period, and that Bayless be subject to penalties for noncompliance with the regulations, no BLM decisions addressing these issues are presently before us.

for every molecule of gas measured at the sales meter just as Bayless is paid the revenue interest attributable to his leasehold operating rights on those same molecules (Response at 6). Bayless maintains that the Tribe's unsubstantiated insinuations that he has manipulated the measurement system completely fail to demonstrate the existence of any manipulation or any benefit to Bayless, especially since lower rate non-Tribal production and higher rate Fruitland Coal formation production have historically been minuscule in comparison with total production on the system (Response at 6-7).

We reject Bayless' contention that BLM's August 13, 1992, approval of his surface commingling and off-lease measurement plan precludes BLM from reevaluating that method. Gas measurement requirements are set out in 43 CFR 3162.7-3:

All gas production shall be measured by orifice meters or other methods acceptable to the authorized officer on the lease pursuant to methods and procedures prescribed in applicable orders and notices. * * * Off-lease measurement or commingling with production from other sources prior to measurement may be approved by the authorized officer.

BLM issued Onshore Oil and Gas Order No. 5, effective March 27, 1989, to implement and supplement this regulation. 54 FR 8100 (Feb. 24, 1989). Part III.D of this order, which is binding on operators of Federal and restricted Indian oil and gas leases (see 43 CFR 3164.1), discusses gas measurement by methods other than orifice meters at a location on the lease and requires that prior approval from the authorized officer be obtained before using any alternative method. 54 FR 8109 (Feb. 24, 1989). An operator requesting approval for an alternative gas measurement system and off-lease measurement must demonstrate that the system will meet or exceed the objectives of the applicable minimum standard or will not adversely affect royalty income or production accountability. 54 FR 8109-10 (Feb. 24, 1989).

In this case, BLM became aware, as stated in RPRAO's April 12, 1994, order, of "a significant difference between allocation meter [volumes] and sales meter volumes." ^{12/} Such discrepancies raised questions about the adequacy of Bayless' surface commingling and off-lease measurement plan and amply justified BLM's decision to rescind its approval in order to reconsider whether the approved plan remained a viable method for measuring gas production. Although Bayless has attempted to place the burden of refuting the propriety of the approval on BLM, Onshore Oil and Gas Order No. 5 clearly requires the operator to show that the alternative measurement method will not adversely affect royalty income or production accountability.

^{12/} These volume differences were quantified after audit in RPRAO's subsequent Aug. 17, 1995, decision.

Allowing the plan to remain in effect in the face of the discovery of possible discrepancies would have subverted BLM's duty to ensure that production from Federal and Indian leases was being accurately measured and apportioned. An operator is not entitled as a matter of right to approval of a surface commingling and off-lease measurement plan but must satisfy BLM that the plan meets applicable requirements. Approval of a plan is hardly immutable since changing circumstances may render inadequate a once acceptable measurement system. Accordingly, we find that BLM could rescind approval of Bayless' surface commingling and off-lease measurement plan, and that its decision to do so here was proper in view of the absence of supporting data and the possibility that production was not being properly allocated. 13/

However, we agree with Bayless that the rescission decision should not be given retroactive effect. Bayless applied for approval of his surface commingling and off-lease measurement plan on August 12, 1992, as he was required to do. BLM approved the plan on August 13, 1992, based upon whatever information Bayless had submitted at the time. Bayless allocated production after that date in conformance with the approved plan. While BLM's current reevaluation of the plan suggests that the previously approved plan might be inadequate to accurately account for production from the Tribal leases, that conclusion does not negate the fact that BLM originally approved the plan and Bayless acted in reliance on BLM's approval. Furthermore, the Tribe's intimations notwithstanding, nothing in the record establishes that Bayless unjustly profited from the approved plan to the detriment of the Tribe. Under these circumstances, it would be unfair to penalize Bayless for measuring and allocating production in accordance with the approved plan by requiring him to retroactively adjust his production volumes. See Viersen & Cochran, 134 IBLA 155, 166 (1995) (holding that the Government can be bound by an earlier affirmative recognition of a contract's acceptability as a basis for establishing a transportation

13/ We stress that the record presently before us contains insufficient data upon which to base an informed analysis of the appropriateness of Bayless' plan. Accordingly, our affirmance of BLM's rescision of its approval does not constitute a decision that the plan must be rejected. We see no reason why BLM could not approve such a plan, if supported by the data required by Onshore Oil and Gas Order No. 5, supra. On the other hand, when resubmitted, the plan could be rejected by a BLM decision setting out supporting reasons in adequate detail.

We note that on June 3, 1994, Bayless submitted for BLM approval a more comprehensive surface commingling and off-lease measurement plan for the wells located on Tribal lands that are connected to Cabresto Gathering System (SOR (IBLA 94-714) at 5 n.7). The additional information should facilitate BLM's evaluation of the acceptability of the plan. Our decision affirming BLM's rescision of its prior approval is without prejudice to that evaluation.

allowance made by the official authorized at that time to make that determination); Supron Energy Corp., 46 IBLA 181, 191 (1980) (holding that where the Department has specified that a valuation methodology is adequate, it may not later assert that this method is incorrect or incomplete and reassess value retroactively). 14/

Accordingly, we modify BLM's April 12, 1994, rescission decision to the extent that we find it inapplicable to the period prior to April 12, 1994, the date of the RPRAO's decision. We also reverse BLM's September 29, 1995, decision determining volume discrepancies and ordering the filing of amended production reports for the period August 1992 through April 1994, as we have ruled the off-lease measurement was proper during that time.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 13, 1994, NMSO decision is reversed insofar as it ordered Bayless to disconnect or shut in the three non-Tribal wells; NMSO's June 24, 1994, decision upholding rescission of BLM's August 13, 1992, approval is affirmed as modified; and NMSO's decision of September 29, 1995, is reversed.

David L. Hughes
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

14/ The propriety of Bayless' allocation of production and his determination of the volume of production during the period before BLM's approval of the plan on Aug. 13, 1992, are not before us. Nor does this decision go to the propriety of those actions during the period after the Apr. 12, 1994, effective date of the rescission.